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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DAN KING BRAINARD
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

(1) Is a defendant denied his constitutional right to present evidence when a number of crucial defense exhibits from his previous trial are lost through no fault of his own.

(2) May a defendant be deemed to have waived an issue (in this case the destruction of the evidence) even though he raised the issue before the close of his case, the district court ruled on the merits of the issue, and there was not even an allegation that the trial court or the government was prejudiced by the so-called "late" disclosure of the issue.

(3) May extrinsic evidence of a defendant's participation in an allegedly fraudulent business scheme be admitted without the government's showing that the allegedly fraudulent scheme was indeed fraudulent and that defendant knew it was fraudulent.

(4) Does the trial judge impermissibly create an inference that he is punishing a defendant for going through a retrial when upon resentencing after retrial he gives the defendant a much harsher sentence than he gave the defendant's co-defendant who had pled guilty rather than face retrial, even though the co-defendant had received a harsher sentence than the defendant after the first trial.

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported as United States v. Daniel King Brainard, 745 F. 2d 320 (4th Cir. 1984), and appears as Part I of the Appendix hereto. The decision of the Court of Appeals denying Petitioner's motion for rehearing and suggestion for rehearing en banc (without further opinion) is not yet reported, and appears as Part II of the Appendix hereto. The Order granting a stay of the mandate pending application for certiorari appears as Part III of the Appendix hereto.

JURISDICTION

The Petitioner's conviction was affirmed by the United States Court of Appeals for the Fourth Circuit on October 4, 1984. Petitioner's motions for rehearing and suggestion for rehearing en banc were denied on November 13, 1984. Jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is conferred on this Court by 28 U.S.C.s. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offense to be twice put in jeopardy of life or limb nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution, Section I:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

> shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 United States Code, Section 1735(b):

> Whenever the United States is interested in any lost or destroyed records or files of a Court of the United States, the clerk of such court and the United States Attorney for the district shall take the steps necessary to restore such records or files, under the direction of the judges of such court.

STATEMENT OF THE CASE

Petitioner Dan King Brainard and co-defendants Halton Q. Bittick, Sheldon S. Moss, and Sheldon Rothman were indicted on eighteen counts of mail

fraud in violation of 18 U.S.C. ss. 1341 and 2 in a superseding indictment filed on February 25, 1980. Moss pled guilty to all charges, and charges against Rothman were dismissed. Petitioner and Bittick were tried to a jury and convicted on thirteen counts of mail fraud. Bittick was also convicted on one count of making a materially false and misleading statement to the SEC in violation of 15 U.S.C. s. 78.

Both defendants received sentences of five years. Bittick also received a concurrent three year sentence and a $10,000 fine on the SEC count, and a $2,000 fine on the mail fraud counts.

On appeal, the Fourth Circuit Court of Appeals reversed the convictions of both Petitioner and Bittick because of

the district court's failure to allow exculpatory statements by Sheldon Moss that neither Petitioner nor Bittick had knowledge of the fraudulent scheme Moss had perpetrated.

Moss' scheme consisted of offering clients of Mr. Brainard's and Mr. Bittick's small Greensboro, North Carolina investment firm, National Executive Planners, Inc. (NEP) the opportunity to make loans to Moss' Chicago company, Television Marketing Corporation (TVM) at an attractive fixed annual interest rate. At some point in time TVM's legitimate marketing activities were curtailed and the company was reduced to a shell through which Moss continued to funnel investors' money. Moss was able to keep

the scheme going for a number of years by paying interest on the old loans with the principal flowing in from new loans. Petitioner at trial did not contend that the scheme was not fraudulent, but maintained that he, like everyone else, was unwittingly duped by Moss.

Prior to retrial co-defendant Bittick pled guilty to the SEC charge in which Petitioner was not named. The other charges against Bittick were dismissed. Retrial commenced in Winston-Salem, North Carolina on July 6, 1983, before the Honorable Richard C. Erwin, District Court Judge for the Middle District of North Carolina, and a jury. Petitioner was convicted on twelve counts of mail fraud despite

testimony from Moss' former secretary and two of his former attorneys that they had been told by Moss that Petitioner was unaware of the fraudulent nature of the investment.

Before the close of Petitioner's case Petitioner had moved that the indictment be dismissed or in the alternative that a mistrial be granted on the ground that crucial exhibits from Petitioner's last trial had been lost by either the clerk's office or a member of the panel that had heard Petitioner's first appeal. A hearing on these motions was held on September 7, 1983.

On September 14, 1983, the district court denied Petitioner's motions and sentenced him to 48 months. Co-defendant Bittick had been sentenced the week

before to eight months and ordered to pay a fine of $5,000.

Petitioner's conviction was affirmed by a panel of the Fourth Circuit on October 4, 1984. A petition for rehearing and suggestion for rehearing en banc were timely filed and, on November 13, 1984, were denied.

REASONS FOR GRANTING THE WRIT

I. IN FAILING TO FIND THAT PETITIONER'S CONSTITUTIONAL RIGHT TO PRESENT EVIDENCE WAS VIOLATED WHEN A NUMBER OF CRUCIAL DEFENSE EXHIBITS FROM HIS PREVIOUS TRIAL WERE LOST THROUGH NO FAULT OF HIS OWN, THE COURT OF APPEALS FAILED TO FOLLOW DECISIONAL LAW OF THIS COURT AND AN EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED TO REMEDY THIS ERROR.

At retrial, prior to resting his case, Petitioner's counsel moved in open court to dismiss the indictment or in

the alternative for a mistrial based on the fact that 22 defense exhibits from the first trial including at least 4 that were critical to Petitioner's defense were apparently inadvertently lost by either the Clerk's Office of the Fourth Circuit Court of Appeals or one of the members of the three judge panel that had considered Petitioner's first appeal and these exhibits were unavailable for use by Petitioner in his defense. The trial judge took the matter under advisement. An evidentiary hearing was held almost two months after the verdict. One week after the hearing, immediately prior to sentencing, the trial judge denied both of Petitioner's motions.

The Court of Appeals' affirmance of

the trial judge's refusal to dismiss the indictment or declare a mistrial once Petitioner made his showing that the evidence was lost, that it could not be found or replaced, and that Petitioner was prejudiced thereby, completely ignores both the facts brought out at the hearings on this issue and also the prior decisional law of this Court.

The right of a Defendant to present evidence is a right which has independent status under the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments. Washington v. Texas, 388 U.S. 14 (1967). It can also be argued that the right of a defendant to present evidence is a corollary of the right to have all

elements of the crime proven by the prosecution. This follows since, presumably, the more favorable evidence an accused presents to the court or jury, the more difficult is the prosecution's task of proving guilt beyond a reasonable doubt.

In the present case the Petitioner's right to a fair trial was violated because he was prevented from presenting critical evidence by the loss or destruction of that evidence through no fault of his own. In essence, he was not afforded "the right to a fair opportunity to defend against the state's accusations." Chambers v. Mississippi, 410 U.S. 284, 294 (1973).

As clearly set forth by this Court in United States v. Valenzuela-Bernal,

458 U.S. 858 (1982), in order to establish a violation of the Compulsory Process Clause of the Sixth Amendment the defendant must only make "some showing that the evidence lost would be both material and favorable to the defense." Id. at 873 (emphasis added).

Petitioner presented evidence at the post-trial evidentiary hearing that at least four of the lost exhibits were critical to his case. These exhibits can be described as follows:

Exhibit 20 -- Sears invoice and shipping receipt that had been furnished to Petitioner by Moss to corroborate Moss' statements to Petitioner that he was doing business with Sears.

Exhibit 35 -- Videotape of three

separate color commercials that had been furnished to National Executive Planners by Moss and TVM. Moss had told Brainard the commercials had run on television to promote the following TVM products: Frig-A-Care -- an aerosol in a can which deodorized or cleaned a refrigerator; Tidy-Up -- a car kleenex holder; and Silent Sentry Chain Lock -- a chain lock used in homes as a protection device. The videotape was shown to the jury at the first trial.

Exhibit 36 -- Sales brochure including information on ASI Company, a factoring house which factored TVM's accounts receivables at the time TVM approached NEP. The brochure indicated ASI was charging TVM approximately 36-48% a year for factoring costs. This

helped explain why TVM was willing to pay such a high interest rate to TVM investors since even with commissions to NEP salesmen TVM would be saving at least 18% a year by going through NEP investors rather than a factoring company.

Exhibit 5 -- A letter written under a Sears letterhead dated April 8, 1975 from Mr. Clower of Sears to Mr. Rothman confirming a financial arrangement. This exhibit showed that Sears did, in fact, do business with Rothman who was president of TVM.

Petitioner has consistently argued that these exhibits were critical to his case because they demonstrated: (1) the reasonableness of his beliefs in representations made by Moss to him that

TVM was a legitimate on-going business; and (2) the extent of the scheme perpetrated by Moss. Furthermore, the exhibits made more credible Petitioner's testimony that he did not know TVM was a fraud.

In view of the closeness of the case, the relevancy of the above-listed exhibits to the key issues of the case and the questions from the jury while deliberating requesting definitions for the terms "specific intent" and "reckless indifference", Petitioner has been able to set forth a good faith belief that he was prejudiced by the loss of these exhibits and that the introduction of these exhibits would have changed the outcome of this case.

In a situation like the one

presented here, where neither party is at fault, the burden, like all burdens in a criminal case, must fall on the government. This is recognized as an elementary principle of law and is further fortified in this case with statutory authority. 28 U.S.C. 1735 (b) states:

> "Whenever the United States is interested in any lost or destroyed records or files of a court of the United States, the clerk of such court and the United States Attorney for the district shall take the steps necessary to restore such records or files, under the direction of the judges of such court."

The Court of Appeals totally disregarded the statute holding that it was the responsibility of the defendant to "ascertain whether copies of the missing exhibits were actually extant prior to trial." The panel thereby unfairly shifted the burden of producing

the exhibits to the Petitioner even though the government was notified before the Petitioner that there was a "problem" with some of the exhibits.

It should be noted that the exhibits clearly were lost by either a member of the panel that heard the first appeal or by the Clerk's Office. Debating who should have been responsible for finding the exhibits and when the issue should have been raised before the trial judge is irrelevant in view of the post-trial testimony of the representative from the Clerk's Office that the exhibits were irretrievably lost before the Petitioner was even notified they were missing. The real issue here is not who should have found the exhibits and when but who should

bear the burden when exhibits are lost when the defendant is not at fault

Petitioner has shown that the missing exhibits were material and favorable to his case. Thus, under Valenzuela-Bernal, Petitioner has established a violation of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. The decision of the Court of Appeals, failing to follow the clear holding of this Court, is thus in direct and irreconcilable conflict with Valenzuela-Bernal and 28 U.S.C.s. 1735 (b), warranting the grant of the writ.

II. IN HOLDING THAT PETITIONER WAIVED HIS RIGHT TO OBJECT TO THE ABSENCE OF THE MISSING EXHIBITS EVEN THOUGH PETITIONER RAISED THE ISSUE BEFORE THE CLOSE OF HIS CASE, THE DISTRICT

COURT RULED ON THE MERITS OF THE ISSUE, AND THERE WAS NOT EVEN AN ALLEGATION THAT THE TRIAL COURT OR THE GOVERNMENT WAS PREJUDICED BY THE SO-CALLED "LATE" DISCLOSURE OF THE ISSUE, THE FOURTH CIRCUIT IS IN DIRECT CONFLICT WITH THE ELEVENTH, FIFTH AND NINTH CIRCUITS.

Factual Background - Petitioner's original conviction in this case was reversed and the mandate was issued in early February, 1983. The Record was returned to the Fourth Circuit by the original panel and was passed on to the District Court Clerk's Office in Greensboro, North Carolina, so that preparations might be made for the second trial of Mr. Brainard. In reviewing the Record, the District Court Clerk's Office determined that many of Petitioner's exhibits were missing. Mr. Vaughn of the District Court Clerk's Office contacted Ms. McCulloch, a senior clerk employed by the Fourth Circuit

Clerk's Office, and told her that the exhibits were missing.

Ms. McCulloch instructed Mr. Vaughn to return as much of the Record as he had, which he did. Ms. McCulloch assigned one of her deputy clerks to check the exhibits against the exhibit list. This deputy clerk, Ms. Upshire, identified a number of defense exhibits that were missing and found a number of papers in the exhibit boxes that did not belong to the case. When Ms. Mcculloch realized what a mess the file was in, she contacted all the judges on the panel in an attempt to track down the exhibits. None of the members of the panel knew what had happened to the exhibits. Ms. McCulloch then tried to track down the source of the extrinsic

documents hoping that she would find the Brainard exhibits where the extrinsic documents should have been. That, too, led nowhere.

When Ms. McCulloch determined she could not find the missing exhibits, she instructed Ms. Upshire to contact Petitioner's previous attorney, Mr. Wachtel, to see if he had copies of the missing exhibits. Ms. Upshire did not tell Mr. Wachtel any of the exhibits were missing. She simply said there was a problem with the exhibits and asked Mr. Wachtel if he had copies. He said he had copies of exhibits in a box he was sending to Petitioner's newly retained attorneys. Ms. Upshire understood this to mean Mr. Wachtel was sending copies of <u>all</u> exhibits. Through

an affidavit, Mr. Wachtel later stated he never told Ms. Upshire he had copies of all the exhibits and in fact, he did not have copies of all the exhibits and sent only those few he did have to newly retained counsel.

Erroneously believing that Mr. Wachtel had told Ms. Upshire he had copies of all defense exhibits, Ms. McCulloch notified newly retained counsel and the government by letter that although there had been a problem with missing defense exhibits, there no longer was a problem because Mr. Wachtel had copies of all the exhibits and had sent them to newly retained counsel.

Relying on the representations made by Ms. McCulloch that Mr. Wachtel had copies of all exhibits previously

introduced by defendant at his first trial, Petitioner's newly retained counsel assumed that copies of all 38 of the exhibits admitted at the first trial were contained in a closed folder captioned "Defendant's Exhibits" that counsel had received from Mr. Wachtel as part of a large number of boxes containing Mr. Wachtel's case file.

Defense counsel first discovered exhibits were actually missing Thursday, July 7, two days into the trial. There had been no reason to view the exhibits earlier in preparation for the trial since defense counsel were familiar with what the exhibits would show from their review of the transcripts from the first trial and their discussions with Petitioner. Once the exhibits were

discovered missing, counsel were able to replace many of the lost exhibits and use them in the defense case.

On Monday, July 11, local counsel informed the prosecution that one of its key exhibits, video tapes of the commercials of the products TVM was promoting, was missing. On that day counsel was also finally able to reach Mr. Wachtel, who had been on vacation. Through his discussions with Mr. Wachtel, counsel discovered the apparent misunderstanding between Ms. Upshire and Mr. Wachtel that had led Ms. Upshire to erroneously report that Mr. Wachtel had copies of <u>all</u> exhibits when in fact he had copies of only about half the exhibits.

Petitioner continued to try to find

substitutes for the lost exhibits, but by the close of Petitioner's case on July 14, it had become apparent that approximately ten of the exhibits were simply irreplaceable and that at least four of the missing exhibits were critical to Petitioner's case. Accordingly, prior to the close of his case, Petitioner moved to dismiss the indictment and in the alternative moved for a mistrial.

Based upon the preceding uncontradicted facts, the Court of Appeals held that "defendant has waived any possible objections arising from the missing exhibits through failure to make a timely investigation and presentation of such claim to the district court". The panel opinion does not cite even a

single authority supporting its remarkable conclusion that Petitioner's objections arising from the lost evidence were waived.

The panel criticized Petitioner for lack of a "timely investigation". However, had Petitioner discovered the exhibits were missing the day after the Clerk's letter arrived in early March of 1983, the evidence is unrebutted that the lost evidence could not have been found. This is quite clear from Ms. McCulloch's testimony which the panel opinion totally ignored.

> Q. Was there anything you could have done you did not do in order to locate the missing documents?
>
> A. I believe not, sir.
>
> Q. Would you say that you did a thorough investigation?

A. Absolutely.

Q. Could you go back today and investigate and find the missing documents? Do you believe you could?

A. No sir. I don't feel, with the resources available to the Court of Appeals, that there is any further investigation that we could do.

Q. Was there any point in time that you feel, had you known there were documents missing, there was something you could have done about it given the papers you had?

A. Not really....

The panel opinion further stated counsel should have presented their claim to the district court earlier. Yet the panel opinion does not even allege that the trial court was in any way prejudiced by the so called "late" disclosure. Counsel informed the trial judge of the problem as soon as it

became clear to counsel that some documents were irreplaceable. The disclosure was made in the form of a motion prior to the close of Petitioner's case. Petitioner had specifically reserved the right to make additional motions prior to the pretrial conference which was held on May 11, 1983. At the time the trial judge was informed of the missing exhibits, he was in no worse position than he would have been had the disclosure been made at any other time.

The Split Among Circuits - The Fourth Circuit's holding that Petitioner waived any claim concerning the destruction of the evidence is directly at odds with the holdings of every other circuit that has considered the waiver

issue.

In United States v. Crosby, 739 F.2d 1542, 1548 (11th Cir. 1984) the Eleventh Circuit held that assuming defendant's failure to move for suppression of certain evidence prior to commencement of trial would amount to a waiver, the merits of the motion were properly raised on review where the district court entertained argument and ruled on the merits of the motion. See also, United States v. Marx, 635 F.2d 436, 440-41 (5th Cir. Unit B 1981) and United States v. Contreras, 667 F.2d 976, 978 n.2 (11th Cir. 1982).

Similarly in Taglavore v. United States, 291 F.2d 262, 264-5 at fn 1 (9th Cir. 1961) the Ninth Circuit held that even though the defendant failed to file

a pretrial motion to suppress, since the trial judge elected to consider on its merits objection to admission of the evidence, that question was not waived and was properly before the reviewing court on appeal. See also Wrightson v. United States, 222 F.2d 556 (D.C. Cir. 1955).

In the present case Petitioner prior to the close of his case moved to dismiss and in the alternative moved for a mistrial. This motion, unlike a suppression motion, need not have been filed prior to trial under Rule 12(f). But even assuming arguendo it should have been filed pretrial, the trial judge in effect "waived" the waiver issue by rejecting Petitioner's motion on its merits after hearing arguments on

the motion and even holding an evidentiary hearing on the motion.

In United States v. Whimpy, 531 F. 2d 768, 772 (5th Cir. 1976) the Fifth Circuit held that defendant did not waive his motion for a mistrial when he decided to delay the motion for "tactical" reasons. Here Petitioner is in even a stronger position since any so-called "delay" in requesting a mistrial was not for tactical advantage but rather for allowing counsel to find or replace the missing exhibits.

Because the panel decision conflicts with the principles announced in the decisions of every circuit that has examined the issue, the grant of the writ is warranted.

III. THE HOLDING OF THE COURT OF APPEALS THAT EXTRINSIC EVIDENCE OF PETITIONER'S PARTICIPATION IN AN ALLEGEDLY FRAUDULENT BUSINESS SCHEME IS ADMISSIBLE WITHOUT A SHOWING BY THE GOVERNMENT THAT THE ALLEGEDLY FRAUDULENT SCHEME WAS INDEED FRAUDULENT AND PETITIONER KNEW IT WAS FRAUDULENT AT THE TIME OF HIS PARTICIPATION IS IN DIRECT CONFLICT WITH UNITED STATES V. BEECHUM, 582 F.2d 898 (5th Cir.), cert. denied, 440 U.S. 920 (1979)

Prior to TVM, Moss operated an investment called "Golden West Utilities." Moss had promised Golden West investors monthly interest payments at an annual rate of twelve percent and had claimed that their investments were secured by a second mortgage on undeveloped Arizona land. When Golden West went bankrupt Moss was enjoined from selling unregistered securities in an action brought by the SEC.

Before the SEC injunction Mr. Brainard had sold Golden West only one time to one client. No one claimed that Mr. Brainard ever knew there was any problem with Golden West when he sold it.*

In fact, during the retrial the government specifically stated to the trial court: "There is no evidence at all that this defendant participated in any manner in a fraud that involved Golden West. . ."

The panel held that Golden West evidence was admissible on the issue of knowledge since Petitioner knew one of his clients had suffered a loss on Golden West. According to the panel,

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* Once Mr. Brainard discovered there was a problem with Golden West he reimbursed out of his own pocket all money lost by the one client to whom he had sold the investment.

Petitioner should have checked out TVM more thoroughly because of the Moss connection.

The panel ruled the government was not required to prove Golden West was fraudulent or that Petitioner knew it was fraudulent. This holding is in direct conflict with the analysis set forth in United States v. Beechum 582 F. 2d 898, 911 (5th Cir. 1978), cert. denied 440 U.S. 920 (1979). See also United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982). Under the Beechum test, first it must be determined that the extrinsic act evidence is relevant to an issue other than the defendant's character. Second the evidence must

possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403.

According to Beechum, relevance is a function of the similarity of the extrinsic act to the offense charged. However, in this regard "similarity means more than that the extrinsic act and charged offense have a common characteristic. For the purposes of determining relevancy, 'a fact is similar to another only when the common characteristic is the significant one for the purposes of the inquiry at hand'. . . . Therefore, similarity and hence relevancy, is determined by the inquiry or issue to which the extrinsic offense is addressed." Id. at 911. See

also United States v. Mohel, 604 F.2d 748 (2nd Cir. 1979): United States v. Drury, 582 F.2d 1181 (8th Cir. 1978). The reasoning is that if a defendant knowingly participated in the extrinsic scheme to defraud it is more likely that he knowingly participated in the present scheme to defraud.

Here the common characteristic between the extrinsic act (Golden West) and the alleged offense (TVM) is the way Moss had set up the two investments. However, this common characteristic was not the significant one for purposes of the inquiry. The "significant issue" here was the Petitioner's alleged knowledge that he was participating in a fraudulent scheme. Thus, in order to have evidence concerning Golden West

admitted, the government had to show, not that Golden West was similarly structured to TVM, but that Mr. Brainard had knowledge that during his extremely brief and tangential participation with Golden West he was participating in a scheme to fraud. If the government cannot make such a showing, the judge must exclude the extrinsic act evidence as irrelevant. Id. at 912. See also, United States v. Neary, 733 F.2d 210, 216-17 (2nd Cir. 1984).

Not only did the government fail to make such a showing but, as noted above, the government freely conceded that it did not even allege that Mr. Brainard knew that Golden West was fraudulent. Furthermore, the district judge specifically held that the government

had not even shown that Golden West was a fraud much less that defendant knew he was participating in a fraud.

Without showing that Petitioner knew he was participating in a fraudulent investment, the admission of Golden West had little or no probative value since it is simply a fact of life that some investments recommended by stock brokers do not work out. However, the admission of the evidence was extremely prejudicial because of Golden West's connection with Moss, a man correctly perceived to be a con artist. Yet there was no evidence that at the time he marketed Golden West or TVM Brainard knew Moss was a con man. By allowing in Golden West, the trial judge allowed the jury to find Mr. Brainard

guilty solely on his past association with Moss.

The panel states that whether the evidence was prejudicial was a matter for the discretion of the trial court. However, the Record is quite clear that despite pleas from the defendant, the trial judge failed to even consider whether the evidence was prejudicial. Accordingly, the trial court failed to comply with the second prong of the Beechum test. See United States v. Woods, 484 F.2d 127, 134 (4th Cir. 1973): Fed. R. Evid. 403.

This Court should grant certiorari to resolve the conflict between the circuits on rules regarding the admission of extrinsic evidence.

IV. WHETHER A TRIAL JUDGE WHO RESENTENCES A DEFENDANT UPON RETRIAL TO A MUCH HARSHER SENTENCE THAN HIS GUILTY PLEADING CO-DEFENDANT -- EVEN THOUGH THE CO-DEFENDANT HAD RECEIVED A HARSHER SENTENCE THAN THE DEFENDANT AFTER THE FIRST TRIAL -- CREATES AN INFERENCE THAT HE IS PUNISHING THE DEFENDANT FOR EXERCISING HIS RIGHT TO A RETRIAL IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.

During the first trial of this case Petitioner and his co-defendant, Mr. Bittick, were considered equally culpable. Each received an identical sentence except that Mr. Bittick was fined $10,000 and received an additional three year concurrent sentence for an SEC reporting violation with which Petitioner was not charged. Mr. Bittick was also fined $2,000 on the mail fraud counts although Petitioner was not fined at all.

Prior to retrial Mr. Bittick entered a plea agreement with the government whereby he agreed to plead guilty to the SEC count in return for the dismissal of all the other counts. Bittick's sentencing was postponed until after Mr. Brainard's trial. He was then sentenced to eight months incarceration and fined $5,000. The maximum sentence he could have received was five years and a $10,000 fine.

Mr. Brainard decided to exercise his constitutional rights and go to trial. After his retrial he was sentenced to four years.

The Fourth Circuit panel mischaracterized this issue as one involving a simple disparity of sentence. By relying on United States v. Melendez, 355 F.2d 914 (4th Cir. 1966) the panel demonstrated a lack of

understanding of the real issue presented here -- whether one can receive harsher punishment simply for exercising his constitutional right to a trial.

Melendez involved a fact situation where defendants who went to trial received harsher sentences than those who pled guilty even though they were arguably less culpable. This would have been the situation here had Mr. Brainard been given a harsher sentence than Bittick after the first trial or had Mr. Brainard gone to trial and been given a harsher sentence than Bittick if Bittick had pled guilty originally.

However in the present situation, the facts are quite different. Here Mr. Brainard received a lighter sentence

than Bittick after the first trial but received a much harsher sentence than Bittick after the first appeal when Bittick pled rather than face another trial. The inference that Mr. Brainard was punished for going to trial is raised not by the disparity of sentence but by the fact that there was no disparity in the original sentence and that the disparity was created only after Mr. Brainard decided to exercise his constitutional rights to a retrial.

The panel sought to differentiate Brainard's sentence from Bittick's by pointing out that they were convicted on different charges since Bittick pled guilty to only the SEC charge. Nevertheless, the maximum punishment (five years) each faced was the same

because of the restrictions placed on the resentencing of Brainard by North Carolina v. Pearce, 395 U.S. 711 (1969). Furthermore, despite the fact that they were convicted of different counts, Bittick's presentence report, like Brainard's, sets forth the same prosecution version of the total offense which included the mail and wire fraud allegations. Thus, when Bittick was sentenced, the trial judge could take into consideration the mail and wire fraud charges that had originally been brought against him even though Bittick did not plead guilty to those charges. The only possible explanation for the disparity in sentence is that the trial judge punished Mr. Brainard for exercising his right to a retrial.

In United States v. Wiley, 278 F.2d 500 (7th Cir. 1960) the Seventh Circuit reviewed a case where the trial judge sentenced a defendant to a harsher sentence because he had pleaded not guilty and stood trial, while his co-defendants who were more deeply involved but had pleaded guilty, were dealt with more leniently. The court concluded its opinion as follows:

> "Our part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful. It is evident that the punishment imposed by the district court on Wiley was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted."

Id. at 504. See also the concurring opinion of Judge Duffy on the same page. The Fourth Circuit in United

States v. Martell, 335 F.2d 764, 766 (4th Cir. 1964) cited with approval the reasoning in Wiley although it distinguished the facts in Wiley from the facts in the case it was then considering.

In United States v. Stockwell, 472 F.2d 764, 766 (4th Cir. 1973) the Ninth Circuit held that where the record left unrebutted the inference that defendant was punished with a longer sentence because he elected to stand trial, the sentence could not be sustained even though the court did not believe the experienced trial judge actually punished the defendant for standing trial.

In the present case defense counsel, by arguing the Wiley and

Stockwell cases to the trial judge, gave the trial judge ample opportunity to rebut the inference that he was punishing Mr. Brainard for going to trial. In response the trial judge stated he did not feel bound by Stockwell because unlike the trial judge in that case he had never told the defendant he would be punished for going to trial. In effect the trial court attempted to distinguish between the case where a defendant is threatened with a harsher sentence for going to trial prior to actually going to trial and the case where defendant was simply punished for going to trial without having been given a warning. Such a distinction is ludicrous and further strengthens the inference that the trial

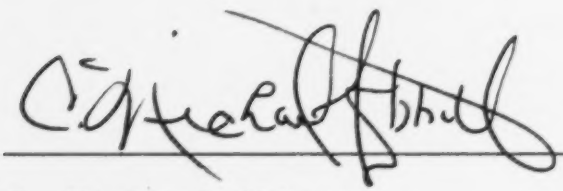
judge here actually did punish Mr. Brainard for going to trial.

If Mr. Brainard's sentence is allowed to stand it will have a chilling effect on the exercise of one's constitutional rights to go to trial by at least creating an appearance that one might be punished more for going to trial than pleading guilty. The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand, and receives a greater punishment. See North Carolina v. Pearce, 395 U.S. 711 (1969). Accordingly, this Court should grant the writ sought herein to decide this important question of federal law, which has not been, but should be settled by this Court.

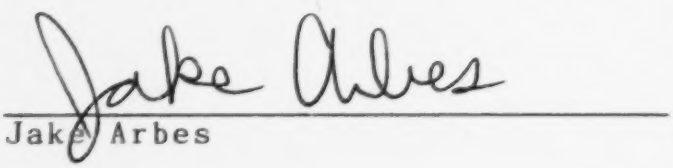
CONCLUSION

For the reasons stated above, we respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit in this case.

Respectfully submitted,



C. Michael Abbott



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APPENDIX

PART I

APPELLATE COURT DECISION

United States of America,
Appellee,

v.

Daniel King Brainard,
Appellant.

No. 83-5242

United States Court of Appeals
Fourth Circuit
October 4, 1984

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard E. Erwin, District Judge. (Cr. 80-17-02-G)

Before RUSSELL, HALL and CHAPMAN, Circuit Judges.

RUSSELL, Circuit Judge:

Daniel King Brainard appeals from his convictions following his second

jury trial on muliple counts of mail fraud, arising from his role in a fraudulent investment scheme. We affirm.

Brainard and three co-defendants, Halton Q. Bittick, Sheldon S. Moss and Sheldon Rothman, were originally indicted on January 28, 1980 on 18 counts of mail fraud, 18 U.S.C. ss 1341 and 2. Brainard and Bittick were additionally charged with one count of making a materially false and misleading statement to the Securities and Exchange Commission (SEC), in violation of 15 U.S.C. s. 78ff and 18 U.S.C. s. 2. A

superseding indictment filed on February 25, 1980 deleted Brainard from the SEC count. Moss pled guilty to all charges, while charges against Rothman were dismissed. The first jury trial led to convictions of both Brainard and Bittick on mail fraud counts 3 to 13, 15, and 18, while Bittick was also convicted on the SEC count. Both defendants received concurrent sentences of five years, and Bittick was fined $12,000. On appeal, we reversed and remanded for a new trial, finding that the district court had erred in failing to admit hearsay statements by Moss exculpatory of Brainard and Bittick. United States v. Brainard, 690 F.2d 1117 (4th Cir. 1982). Prior to retrial Bittick pled guilty to the SEC count, while the mail

fraud counts against him were dismissed pursuant to a plea bargain; he received an eight month sentence and $5,000 fine. Upon retrial, Brainard was again convicted on mail fraud counts 3, 4, 6 to 13, 15, and 18, and received a sentence of 48 months.

I.

The facts of this complex case are recounted in our prior Brainard opinion, 690 F.2d at 1119-21, and need only be briefly discussed here. Brainard and Bittick were co-owners of National Executive Planners, Inc. (NEP), a small investment company located in Greensboro, North Carolina. Moss, a Chicago businessman, engaged Brainard in

July 1973 to market investments in Television Marketing Corporation (TVM), an enterprise controlled by Moss, of which Rothman was an officer. TVM supposedly distributed and marketed various consumer products, and offered to investors a return of 12%, with investments secured by the accounts receivable of large retailers such as Sears, Roebuck. TVM was in fact nothing more than a Ponzi scheme concocted by Moss, and the interest to investors was paid by the fresh investments of victims. Over several years TVM became the most significant investment marketed by NEP, and Brainard and his sales personnel persuaded some 1000 investors to put over four million dollars into TVM. The supposed security offered for

the investments was worthless, and the scheme collapsed when North Carolina issued a cease and desist order in September 1978 against further sales of TVM.

Brainard did not defend the legitimacy of TVM at trial, and the principal question of fact at trial was whether Brainard was a knowing participant in the scheme or had acted in good faith in selling TVM to his clients.

II.

A. On this appeal Brainard seeks a dismissal or new trial owing to the inadvertent loss of several allegedly crucial exhibits from the first trial through no fault of the defense. Due to

the convoluted circumstances of this issue, it is necessary to present the facts at some length. On March 29, 1983 the Clerk of Court for the Middle District of North Carolina sent notice to Brainard's newly retained counsel and to the government that certain of Brainard's trial exhibits, which had been transmitted to this Circuit with the record on the first appeal, were missing. Attached to that notification was a letter from the clerk's office of the Fourth Circuit, in which a senior deputy clerk represented that Brainard's former counsel had claimed to have copies of all defense exhibits. Brainard's new counsel received the case files from former counsel in March 1983, but did not examine the defense

exhibits, allegedly relying on the representation that all exhibits were present. A motion hearing was held prior to trial on May 11, 1983, and defense counsel made no motions with respect to the missing exhibits at that time. Brainard's retrial commenced on July 6, 1983, and on July 11 defense counsel advised the government that defendant's former exhibit 35, a videotape of three TVM commercials, was missing. The parties agreed to stipulate to the former existence of that exhibit and its content, and said stipulation was duly presented to the jury. The defense failed to present any information concerning other missing exhibits until July 14, when, after the close of the government's case and after

all defense witnesses had testified, defendant moved for dismissal or a new trial on the ground of destruction of evidence. The district judge initially stated that he considered any such claim waived due to delay in presentation. In September 1983, after the jury had rendered its verdict, a post-trial hearing was held concerning the missing exhibits. The parties stipulated that defendant's former counsel would have testified that he did not claim to have copies of all defense exhibits from the first trial. The senior deputy clerk of the Fourth Circuit testified that the clerk's office had conducted a thorough investigation and could not locate the missing exhibits. Altogether ten exhibits were alleged by the defense to

be missing and unavailable from other sources. Of these, four are claimed on appeal to have been critical to defendant's case. *

The district court denied defendant's motions on the grounds of delay in raising the matter of the lost evidence and failure to show prejudice

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* Two of these former exhibits, Nos. 5 and 20, allegedly evidenced a relationship between Moss and Sears, Roebuck, supporting Brainard's claim to belief that Moss actually did business with major retailers. No. 35, represented by the defense as the most crucial exhibit, was, as noted above, a videotape of three commercials promoting TVM products, allegedly substantiating Brainard's belief that TVM was a legitimate business. No. 36 was a sales brochure from a factoring house, allegedly indicating why it was more profitable for TVM to seek investments from private investors rather than pay factoring costs. It appears, however, that information comparable to exhibit No. 36 was contained within defendant's exhibit 20-C as well and was thus in evidence at the second trial.

from the loss. We need not decide, on this appeal, whether defendant suffered the requisite prejudice from the loss of the exhibits in question, although we note that defendant's proof of such prejudice was limited. See United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (defendant required to show that testimony of deported witnesses would have been "material and favorable to the defense"). Rather, we hold that defendant has waived any possible objections arising from the missing exhibits through failure to make a timely investigation and presentation of such claim to the district court. There is no indication of bad faith on

the part of the government in this matter, and we may assume as true the allegations of defense counsel that the absence of the copies of the exhibits was not actually realized until the second trial was well under way. Nonetheless, the record clearly shows that counsel had knowledge of the loss of a number of original exhibits some three months prior to trial, and that the files of defendant's former counsel which purportedly contained copies of such exhibits were available for examination during at least the same period of time. Under such circumstances, counsel could reasonably have been expected to ascertain whether copies of the missing exhibits were actually extant prior to trial.

B. At the second trial, over defendant's objection, the government was permitted to introduce evidence of another investment scheme which Brainard had marketed to one client for Moss prior to embarking on TVM. The earlier scheme, known as Golden West Utilities was similar to TVM in many respects, the principal difference being that Golden West purported to offer as security a second mortgage on undeveloped Arizona land, rather than accounts receivable of major retailers. Golden West came to an abrupt end when Moss was enjoined from selling unregistered securities in September 1972. Brainard was aware that his client had lost the bulk of his investment when Golden West went bankrupt.

Defendant contends that this extrinsic act evidence was improperly introduced as bearing on his character, in particular suggesting a propensity to commit frauds. Such a claim is belied, however, by the government's admission that Brainard was not personally committing any fraud in connection with Golden West. The government defends the admission of the Golden West evidence as bearing on Brainard's "knowledge," a permissible use of extrinsic act evidence under Fed.R.Evid. 404(b). We find that the evidence in question was properly admitted on that basis. To justify admission it was not necessary that the government prove Brainard's actual knowledge that Golden West was fraudulent; had Brainard actually been

serving his clients' interests in good faith as he claimed, he could have been expected to undertake a more diligent investigation of TVM where he knew that a client had suffered a substantial loss on a previous Moss investment scheme designed in a comparable fashion. Thus, the Golden West evidence was relevant to the credibility of Brainard's defense, and could properly be admitted. Whether it was unduly prejudicial was a matter for the discretion of the district court under Fed.R.Evid. 403, and that discretion has not been abused. See United States v. Beahm, 664 F. 2d 414, 417 (4th Cir. 1981); United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979).

C. We perceive no basis for Brainard's contention that he was impermissibly punished for the exercise of his right to trial because he received a substantially longer sentence than his co-defendant Bittick, who had pled guilty to a single offense prior to trial. The single fact of a disparity in sentences between a defendant who stands trial and a co-defendant who pleads guilty does not require appellate reversal, as has often been recognized. See e.g. United States v. Melendez, 355 F. 2d 914, 917 (7th Cir. 1966). The first trial led to convictions of both Brainard and Bittick on the same mail fraud counts, and identical terms of imprisonment followed. After the second trial, however, Brainard had been found

guilty of multiple mail fraud counts as before, but Bittick faced sentencing on but a single charge. We are not presented with a situation where both defendants stood convicted of identical charges after retrial.

III.

We find the remaining issues raised by defendant to be without merit.

Accordingly, the judgment of conviction of the defendant is

AFFIRMED.

PART II

APPELLATE COURT DENIAL OF REHEARING

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 83-5242

United States of America,

Appellee,

v

Daniel King Brainard,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion November 13, 1984)

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell with the concurrence of Judge Hall and Judge Chapman.

For the Court,

_____

CLERK

PART III

APPELLATE COURT GRANTING OF
STAY OF MANDATE PENDING
APPLICATION FOR CERTIORARI

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-5242

United States of America,

Appellee.

v.

Daniel King Brainard,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge.

ON MOTION FOR STAY OF MANDATE
PENDING APPLICATION FOR
CERTIORARI

(Order December 10, 1984)

Upon consideration of appellant's motion for a stay of mandate pending application for certiorari;

IT IS ORDERED that the motion is granted, and the mandate is stayed until January 9, 1985.

Entered at the direction of Judge Russell with the concurrence of Judge Hall and Judge Chapman.

FOR THE COURT

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CLERK

Office - Supreme Court, U S
FILED
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STEVAS
CLERK

No. 84-1101

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAN KING BRAINARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the loss of certain defense exhibits during petitioner's appeal following his first trial required dismissal of the indictment.

2. Whether petitioner's innocent involvement in a prior fraud perpetrated by a co-conspirator was admissible for the purpose of showing petitioner's knowledge and lack of mistake.

3. Whether the district court gave petitioner a more severe sentence than a co-defendant solely because petitioner declined to plead guilty.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1101

DAN KING BRAINARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 745 F.2d 320. An earlier opinion of the court of appeals following petitioner's first trial is reported at 690 F.2d 1117.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1984. A petition for rehearing was denied on November 13, 1984 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted on 13 counts of mail fraud, in violation of 18 U.S.C. 1341, and was sentenced to a term of five years' imprisonment. The court of appeals reversed and remanded for a new trial. 690 F.2d 1117 (1982). Following a jury retrial, petitioner was convicted on 12 mail fraud counts and was sentenced to four years' imprisonment.[1]

1. The evidence at trial (see Pet. App. 4a-6a; 690 F.2d at 1119-1121) showed that petitioner, co-conspirator Halton Bittick, and later co-conspirator Sheldon Moss, were co-owners of National Executive Planners, Inc. (NEP), a small North Carolina investment company. Before he became an owner of NEP, Moss was involved exclusively with his own business, Television Marketing Corporation (TVM), which supposedly marketed and distributed consumer products to national retail chain stores. Moss represented that TVM was experiencing cash flow problems because the retail stores did not pay for the merchandise until one to three months after they

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[1] At the first trial, petitioner's co-defendant, Halton Q. Bittick, was convicted on 13 mail fraud counts and one count of making a false statement to the Securities and Exchange Commission; his convictions also were reversed on appeal. Prior to the second trial, Bittick pleaded guilty to the securities count pursuant to a plea agreement. He was sentenced to an eight-month term of imprisonment and was fined $5,000. Co-conspirator Sheldon Moss pleaded guilty to all mail fraud charges before the first trial. Charges against a fourth defendant, Sheldon Rothman, were dismissed before the first trial. Pet. App. 2a-4a.

received it. He suggested to petitioner that NEP clients loan money to TVM, with the loans to be secured by assignments of accounts receivable from large retailers and repaid at an above-market interest rate.

Petitioner agreed to Moss's proposal. For several years, petitioner, Bittick, and the NEP staff recommended to approximately 1,000 NEP clients that they invest in TVM. During this period NEP clients invested over four million dollars in TVM. Petitioner told his sales staff how to market the TVM investment to NEP clients; he instructed them to tell investors who questioned the proposed investment that no other information was available and that if they were uncomfortable they could invest their money elsewhere (C.A. App. 1163, 1169). Investors were informed that there was a connection between Sears, Roebuck and TVM (*id.* at 479, 573). NEP was experiencing financial difficulties during this period. The relationship between NEP and TVM led to improvement of petitioner's own financial situation in various respects. 690 F.2d at 1120.

In fact, TVM was a "Ponzi" scheme in which the interest paid to investors was financed through the investments of new victims. TVM had no relationship with Sears, Roebuck, no office, no employees, and no income. The scheme collapsed in 1978. At trial, petitioner did not dispute that the TVM scheme was fraudulent, but claimed merely that he had been duped along with all of the other victims.

2. Following the first trial, the court of appeals reversed the convictions of petitioner and Bittick because of the district court's failure to admit hearsay testimony about statements by Moss that neither petitioner nor Bittick knew about the fraudulent

scheme. 690 F.2d 1117 (1982). Following a remand, petitioner was retried and was again convicted.

The court of appeals affirmed petitioner's convictions (Pet. App. 1a-17a). The court of appeals held that petitioner had waived any objection to loss of certain defense exhibits during his first appeal by failing to make a timely investigation and presentation of his objection to the district court (*id.* at 6a-12a); that evidence concerning an earlier investment petitioner had marketed for Moss was properly admitted (*id.* at 13a-15a); and that there was no basis for petitioner's contention that he was impermissibly punished for electing a retrial because he received a substantially longer sentence than co-defendant Bittick (*id.* at 16a-17a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. Petitioner first contends (Pet. 9-19) that the loss of certain defense exhibits during the appeal following his first trial interfered with his right to present evidence on his own behalf. He contends also (*id.* at 19-32) that the court of appeals erred in holding that he had waived his objection to loss of the exhibits.

a. On October 7, 1982, the court of appeals reversed petitioner's convictions following his first trial. On March 29, 1983, the district court clerk notified petitioner's newly-retained counsel and the government that some of petitioner's trial exhibits apparently had been misplaced while the case was

on appeal (C.A. App. 44-45). The notification included a letter from a senior deputy clerk of the court of appeals, stating that petitioner's attorney on the first appeal had told her he had copies of all the defense exhibits (*id.* at 46).[2] In March 1983, petitioner's new counsel received the case files from petitioner's former counsel. Pet. App. 7a. Petitioner's new counsel subsequently retrieved the defense exhibits that had been returned to the custody of the district court. On May 11, 1983, the district court held a hearing on pretrial motions. Petitioner's counsel did not mention the problem of missing exhibits at that hearing. C.A. App. 167.

Petitioner's retrial began on July 6, 1983. Around July 12, petitioner's counsel advised the government that a videotape of three TVM commercials (Def. Exh. 35) was missing (C.A. App. 1620). The parties agreed to stipulate to the existence of the exhibit, that the videotaped commercials were played to petitioner when he first visited TVM's Chicago office, and that the subjects of these commercials were three products that Moss told petitioner were distributed by TVM (*id.* at 1542-1543).

In the second week of trial, after all witnesses for the government and the defense had testified, petitioner moved to dismiss the indictment or for a new trial on the ground that defense exhibits from the first trial were missing (C.A. App. 1501-1515). Petitioner's counsel asserted that he had been unable to raise the matter earlier because he had not discovered until the preceding weekend that the exhibits were

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[2] Petitioner's attorney on the first appeal later denied that he had made such a statement to the deputy clerk (C.A. App. 173A-173C).

unavailable (*id.* at 1504-1506, 1511).[3] Counsel did not identify any of the missing exhibits except the videotaped commercials, which he characterized as the "main" one of the missing exhibits (*id.* at 1513). While the jury was deliberating, petitioner's counsel filed a memorandum listing 42 missing exhibits, including the videotaped commercials, and contending that the unavailability of four exhibits particularly prejudiced petitioner (*id.* at 154-157).

On the date set for petitioner's sentencing hearing petitioner again raised the matter of the missing exhibits. Petitioner itemized 13 unavailable exhibits that he alleged were important to his defense (C.A. App. 1573), but acknowledged that many of these exhibits were not essential (*id.* at 1615). The government argued that petitioner had not made an adequate attempt to locate the missing exhibits and had failed to show that he was harmed by the unavailability of the exhibits (*id.* at 1620-1622).

Following a hearing, the district court concluded that petitioner had failed to raise the problem of the missing exhibits in a timely manner and denied petitioner's motion to dismiss the indictment (C.A. App. 1678-1680). The court noted that petitioner failed to notify the court in advance of trial that the exhibits were missing, did not request a continuance

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[3] Petitioner now asserts (Pet. 24) that his counsel discovered on the second day of trial that exhibits were missing. He also states (*id.* at 26) that by the end of trial it became apparent that four of the missing exhibits were critical to his defense. During the trial itself and at the sentencing hearing, however, petitioner's counsel represented to the court that he did not discover that exhibits were missing until the weekend following the first week of trial (C.A. App. 1511, 1647); he also stated at trial that the defense could "do without or replace" all but three of the missing exhibits (*id.* at 1509).

during the trial in order to reconstruct or locate the missing material, and made no apparent effort to locate copies of the exhibits within the files of co-defendants' attorneys. The court also found that petitioner had failed to make an adequate showing of materiality and prejudice.

The court of appeals agreed that petitioner waived his claim by failing to bring the matter of the lost exhibits to the district court's attention in a timely fashion (Pet. App. 11a-12a). The court of appeals noted that petitioner knew for some months before trial that some of the exhibits might be missing and that the exhibits were available for examination during this period. The court concluded that "counsel could reasonably have been expected to ascertain whether copies of the missing exhibits were actually extant prior to trial" (*id.* at 12a). While it declined to decide whether loss of the exhibits resulted in prejudice to petitioner, the court noted (*id.* at 11a) that petitioner's "proof of such prejudice was limited."

b. The court of appeals was correct in concluding (Pet. App. 6a-12a) that petitioner waived his claim based on loss of the exhibits because he failed to bring the matter to the attention of the trial court in a timely manner. Despite the letter from the court of appeals deputy clerk, petitioner's counsel failed to confirm the availability of all the exhibits until the trial was well underway. Once he discovered during trial that some of the exhibits were missing, petitioner's counsel delayed in bringing the matter to the trial court's attention until the close of the defense case. In addition, he failed to seek a continuance within which he could have attempted to obtain substitutes for the missing exhibits.

It may well be, as petitioner contends (Pet. 27-28), that earlier discovery and disclosure of the problem would not have helped to locate the missing exhibits. However, earlier notice of the unavailability of the exhibits would have allowed the parties to attempt to obtain reasonable substitutes. For example, the parties could have entered into stipulations concerning the contents of the exhibits, or transcripts of testimony at the first trial concerning the exhibits could have been read to the jury. One of the missing exhibits—an excerpt from a factoring house sales brochure (DX 36)—was largely duplicated by material in DX 20-C. That material could have been copied and introduced separately to highlight its significance. Petitioner could have attempted to secure copies of another exhibit, a letter from Sears, Roebuck to an officer of TVM (DX 5), from Sears itself. Petitioner's delay in raising the question of the missing exhibits prevented determination of whether the exhibits might have been available in another form.[4]

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[4] The cases petitioner cites (Pet. 29-32) do not conflict with the court of appeals' decision in this case. *United States* v. *Whimpy*, 531 F.2d 768, 772 (5th Cir. 1976), involved a defendant who entered a delayed objection to rebuttal testimony outside the jury's presence and moved for a mistrial at that time. The court of appeals recognized that an immediate objection would have accentuated the prejudicial impact of the testimony and that counsel had objected as soon as possible thereafter. The court also noted that the evidence was so prejudicial that no instruction could have cured the error and the only proper remedy was a mistrial; consequently, the timing of the mistrial motion was irrelevant. The other cases cited by petitioner all stand for the proposition that when an untimely motion to suppress is considered on the merits by the district court, it is appropriate for the court of appeals to

c. Even if petitioner had raised his claim concerning the missing exhibits in a timely manner, he could not prevail. The record does not support petitioner's contention that the four missing exhibits he cites were material and that their unavailability irreparably prejudiced his defense.

The defense exhibit to which petitioner attached the most importance—the videotape of three commercials (DX 35)—was the subject of a stipulation at the retrial; the jury was thereby made aware of both the existence and content of the exhibit. In view of the prosecutor's unrebutted observation at the first trial concerning the unprofessional quality of the commercials (see I Tr. 3617-3618), it is most unlikely that use of the stipulation, rather than the videotape itself, prejudiced petitioner.

A second exhibit—the letter from Sears, Roebuck to an officer of TVM (DX 5)—was read into the record at the first trial (I Tr. 921-923); the

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consider the merits of the district court's ruling. *United States* v. *Crosby*, 739 F.2d 1542, 1548 (11th Cir. 1984); *United States* v. *Contreras*, 667 F.2d 976, 978 n.2 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *United States* v. *Marx*, 635 F.2d 436, 440-441 (5th Cir. 1981); *Taglavore* v. *United States*, 291 F.2d 262, 264-265 n.1 (9th Cir. 1961); *Wrightson* v. *United States*, 222 F.2d 556, 560-561 (D.C. Cir. 1955). While such rulings are probably erroneous under Fed. R. Crim. P. 12 in the absence of a finding of good cause for the procedural default, they involve a different question from that presented here. The cases cited in no way indicate that a court of appeals is required to rule on the merits of an untimely claim concerning missing exhibits, particularly in the circumstances of this case, in which the district court rejected the claim primarily on the ground that it was untimely. In any event, as we show in text, it is clear that loss of the exhibits did not interfere in any significant way with petitioner's ability to present his defense.

transcript of that testimony could have been used in the retrial. In addition, the government witnesses through whom the letter had been introduced testified at the retrial; however, petitioner's counsel did not ask them about the letter (C.A. App. 596-602, 1124-1126). Petitioner himself did testify about the substance of the letter at the retrial. In any event, the letter was of marginal importance to petitioner's defense, which rested on his claim that he was duped by the TVM scheme, not on whether Sears in fact did business with TVM. The conclusion that loss of the letter did not prejudice petitioner's defense is confirmed by the fact that petitioner's counsel at the first trial failed to include the letter in his enumeration of exhibits "that were a substantial part of and critical to the presentation of" petitioner's defense (*id.* at 173B).

A third exhibit—a Sears invoice and shipping receipt (DX 20)—also was introduced through testimony of a government witness at the first trial; a transcript of that testimony could have been used at the retrial. Moreover, another exhibit (DX 4) that was not lost between trials established the same connection between Sears and TVM. As we noted above, and as petitioner himself acknowledged at the post-trial hearing on the missing exhibits (C.A. App. 1602-1603, 1609-1610), the fourth exhibit he cites—a factoring house sales brochure (DX 36)—contained information that was introduced at the retrial as part of DX 20-C. See Pet. App. 10a n.*. In addition, petitioner testified about the brochure at the retrial (C.A. App. 1245-1246, 1254).

This Court has held that even in cases in which the government has taken affirmative steps that result in the loss of evidence, a defendant cannot establish

a constitutional violation unless he makes "some plausible showing of how [the evidence] would have been both material and favorable to his defense." *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (footnote omitted). See also *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9; *Washington* v. *Texas*, 388 U.S. 14, 23 (1967); *Roviaro* v. *United States*, 353 U.S. 53, 62 (1957). Here the loss of the exhibits was inadvertent and was not the responsibility of the prosecution. The exhibits did not play a central role in petitioner's defense, as evidenced by petitioner's counsel's failure to discover that the exhibits were missing until several days into the trial, his failure to bring the matter to the attention of the trial court until after the defense had rested, and his inability to suggest which of the exhibits allegedly were crucial to the defense case until the jury began to deliberate. As we have shown, the unavailability of the four exhibits did not interfere significantly with petitioner's ability to present his defense at the retrial. Thus, petitioner has failed to make a showing that would support his claim to relief.

2. Petitioner next contends (Pet. 33-40) that the trial court abused its discretion in admitting evidence that he previously had encouraged one of his clients to invest in securities of Golden West Utilities, an unrelated business venture of co-conspirator Moss. The court of appeals correctly concluded that this evidence was properly admitted (Pet. App. 13a-15a).

Around the time Moss approached petitioner in connection with the TVM scheme, petitioner was aware that Golden West had defaulted on its obligations, that the Securities and Exchange Commission

had enjoined Moss from selling unregistered Golden West securities, and that the Arizona Strike Force on Organized Crime was investigating Golden West (C.A. App. 1381, 1384-1385, 1405-1407). The evidence of petitioner's prior involvement with Moss and Golden West was introduced to show petitioner's state of mind when Moss approached him with the TVM deal and to rebut petitioner's assertions of ignorance and good faith (*id.* at 359-361). Petitioner contends that the evidence should not have been admitted because he did not know that Golden West was a fraud at the time he urged it as an investment. But as the court of appeals held (Pet. App. 14a-15a), "[t]o justify admission it was not necessary that the government prove [petitioner's] actual knowledge that Golden West was fraudulent; had [petitioner] actually been serving his clients' interests in good faith as he claimed, he could have been expected to undertake a more diligent investigation of TVM where he knew that a client had suffered a substantial loss on a previous Moss investment scheme designed in a comparable fashion."

Petitioner's reliance on *United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979), is misplaced. The court in *Beechum* considered "the admissibility of offenses extrinsic to a defendant's indictment to prove his criminal intent" (*id.* at 902). It held that when evidence of a prior crime is introduced for that reason there must be a common characteristic that is significant for the purpose of the inquiry (*id.* at 911). Where the government sought to show intent to commit the offense charged, the court concluded that there must be proof that the extrinsic offense required the same intent as the charged offense and proof that would

allow the jury to find that the defendant committed the extrinsic offense (*id.* at 913). Here the common characteristic is not petitioner's intent, but Moss's involvement in the two fraudulent schemes. The *Beechum* court's requirement of the same state of mind for both offenses is irrelevant to the question whether the Golden West venture should have put petitioner on notice of the need to exercise extra care in connection with the TVM venture. Moreover, since there was no suggestion of petitioner's culpable involvement in Moss's prior scheme, the danger that Fed. R. Evid. 404(b) addresses—the prejudicial imputation of bad character from prior misconduct—was not present.

3. Petitioner contends finally (Pet. 41-49) that his four-year term of imprisonment was unduly harsh in comparison to the eight-month term of imprisonment and $5,000 fine imposed on his co-defendant Halton Bittick, who pleaded guilty to one securities count prior to the second trial. The court of appeals correctly rejected this claim (Pet. App. 16a-17a).

The sentence imposed on petitioner was well within the statutory maximum for the multiple counts of mail fraud on which he was convicted. It is therefore presumptively a proper exercise of judicial discretion. See *United States* v. *Tucker*, 404 U.S. 443, 446-447 (1972). Moreover, the sentence to a four-year term of imprisonment (accompanied by a recommendation that petitioner be considered for release on parole after serving 20 months, see C.A. App. 178) was shorter than the five-year term of imprisonment to which petitioner had been sentenced after the first trial. On its face, there is nothing unfair or unreasonable about petitioner's sentence. See *United States* v. *Fields*, 689 F.2d 122, 128 (7th Cir.), cert. denied, 459 U.S. 1089 (1982).

Petitioner contends that the sole reason for the disparity between his sentence and Bittick's sentence was petitioner's decision to proceed with a retrial. Petitioner cites no evidence in support of his claim of vindictiveness. As the court of appeals noted, petitioner and Bittick were convicted on the same mail fraud counts at the first trial and received similar sentences. After the second trial, however, petitioner again had been convicted of multiple mail fraud counts, but Bittick faced sentencing on only a single securities charge. Pet. App. 16a-17a. That difference alone is sufficient to explain the discrepancy in sentences.

Moreover, the record shows that the district court based its sentencing decision on a number of specifically identified and appropriate factors. The court noted that, despite the contrary evidence at two trials, petitioner continued to maintain that he was only guilty of "giving bad investment advice" (C.A. App. 1641, 1681; see also *id.* at 297, 1638-1639). In addition, although the scheme had caused his clients to lose more than four million dollars, petitioner repaid only $40,000 in satisfaction of a settlement in a class action against him (*id.* at 1643). The court also referred to the deterrent effect of the sentence on potential wrongdoers and the public interest in seeing that frauds do not go unpunished (*id.* at 1642). The court further noted that Bittick had been convicted on only one count, while petitioner had been convicted on 12 counts (*id.* at 1656); in addition, Bittick refunded approximately $400,000 to the victims of the fraud (*ibid.*), and he agreed to cooperate with the government and was available to testify against petitioner at trial (*id.* at 1672). These considerations fully justify the district court's decision

to impose a substantial term of imprisonment on petitioner and a lesser sentence on Bittick. See *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980); *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *Williams* v. *New York*, 337 U.S. 241, 248-249 n.13 (1949); *United States* v. *Barbara*, 683 F.2d 164, 167 (6th Cir. 1982); *United States* v. *Tracey*, 675 F.2d 433, 441 (1st Cir. 1982); *United States* v. *Bradford*, 645 F.2d 115 (2d Cir. 1981); *United States* v. *Miller*, 589 F.2d 1117, 1138-1139 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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